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MAJOR RAIL CONSOLIDATION
PROCEDURES



**AMTRAK'S REBUTTAL COMMENTS IN RESPONSE TO
NOTICE OF PROPOSED RULEMAKING**

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The National Railroad Passenger Corporation ("Amtrak") submits the following rebuttal comments on the modifications to the Board's regulations at 49 C.F.R. part 1180, subpart A, governing proposals for major rail consolidations that the Board has proposed in the Notice of Proposed Rulemaking served on October 3, 2000.

Amtrak will begin by briefly summarizing the key modifications to the proposed regulations that Amtrak has suggested or supports. We will then address several issues relevant to Amtrak that other parties have raised in their reply filings.

I. SUMMARY OF AMTRAK'S POSITION

◆ The Board should approve future rail mergers only if they will materially improve rail freight and rail passenger service.¹ Amtrak endorses NS's suggestion² that proposed §1180.1(a) be amended to specify that impacts on rail service will be of primary importance when the Board assesses future mergers.

◆ The regulations governing Service Assurance Plans ("SAPs") should specify what level of increased freight train operations will trigger the requirements in proposed §§1180.10(d) & (i) for detailed capacity analyses and planning.³ Amtrak has suggested that these requirements apply to lines on which a merger will increase freight traffic by four or more trains per day. CSX has indicated that it "would not strongly object" to this threshold.⁴

¹ Amtrak Comments on the Advance Notice of Proposed Rulemaking ("ANOPR") at 5.

² NS Comments at 37.

³ Amtrak Comments at 3-5.

⁴ CSX Reply Comments at 75.

◆ The passenger rail-related SAP requirements in proposed §1180.10(b) should be strengthened by requiring that applicants provide “benchmark” and projected performance data for passenger operations, as they are required to do for freight operations, and that applicants consult with affected passenger railroads in preparing their submissions.⁵ DOT, which has endorsed both proposals, has noted that if applicants are not required to submit passenger service performance measurements, it will “be difficult or impossible” for the Board to hold them to their commitments regarding passenger service.⁶ CSX has stated that it does not object to either proposal.⁷

◆ SAPs should include descriptions of the steps applicants will take to address maintenance needs on key rail lines before they implement their merger, and of how they will schedule major maintenance activities to limit interference with merger implementation.⁸ While no party has opposed this proposal, two freight railroads have submitted reply comments, discussed below, that are consistent with Amtrak’s view of how it should be applied.

◆ SAPs should include additional information regarding freight yard and terminal infrastructure.⁹

⁵ Amtrak Comments at 6-7.

⁶ DOT Comments at 19; DOT Reply Comments at 7.

⁷ CSX Reply Comments at 74.

⁸ Amtrak Comments at 7-8.

⁹ Amtrak Reply Comments at 3.

♦ The Board should continue its practice of retaining jurisdiction during the merger oversight period to impose conditions to remedy unforeseen harms to rail service.¹⁰

♦ Any remedies that the Board chooses to adopt to compensate shippers for merger-related service problems should be made available to passenger rail operators as well.¹¹

II. AMTRAK'S RESPONSE TO REPLY COMENTS

The reply comments of several Class 1 railroads included detailed discussions of passenger rail issues. Many of these comments appear to be primarily or exclusively addressed to commuter rail operations.¹² However, several of the points these railroads have raised warrant further discussion.

A. Conditions Should Be Imposed to Ameliorate Any Merger-Related Harms to Amtrak's Service

Both UP and CSX recognize that the Board should consider potential benefits and harms to passenger service in determining whether to approve or disapprove future mergers under the statutory "public interest" test.¹³ However,

¹⁰ Amtrak Reply Comments at 10.

¹¹ Amtrak Reply Comments at 9-10; see also DOT Comments at 19 (endorsing this position).

¹² CSX caveats its statement that "the preservation of passenger rail services [should not] take[] precedence over freight rail services" with an acknowledgement "that Amtrak enjoys certain rights under federal statute." (CSX Reply at 71, n. 1.) Similarly, UP notes in its discussion of "[t]he damage that passenger service inflicts on freight service" that high density commuter rail operations impose much greater "capacity and operating requirements" than a "twice-per-day" passenger service. (UP Reply at 28-29.)

¹³ UP Reply Comments at 29; CSX Reply Comments at 69.

UP also urges the Board to “be very cautious . . . in conditioning mergers for passenger service.”¹⁴

Harm to Amtrak services should be treated the same as any other harm to the public interest when the Board decides whether to impose conditions on mergers. Indeed, the “increas[ing] congest[ion]” on our “busy roads and highways” that UP notes,¹⁵ to say nothing of the near gridlock in our nation’s air transportation system, makes it even more imperative that the Board ensure that future mergers will not harm Amtrak’s service. While UP expresses concerns that passenger-related conditions will consume scarce freight capacity, conditions that require railroads to provide sufficient capacity to accommodate merger-related increases in freight operations will, of course, benefit all rail users.¹⁶ Thus, the Board should not hesitate to impose such conditions on mergers that make them necessary.

Amtrak agrees with UP that the Board should not impose conditions to remedy “minor impacts on passenger service”, such as the seven-minute delay to a passenger train that UP hypothesizes.¹⁷ Amtrak notes, however, that the

¹⁴ UP Reply Comments at 29.

¹⁵ UP Reply Comments at 27

¹⁶ Amtrak does not expect the Board to impose conditions to remedy pre-existing capacity problems that are not created or exacerbated by a merger. (Amtrak Comments on ANOPR at 7-8.)

¹⁷ UP Reply Comments at 31.

delays its trains experienced following recent rail mergers were measured in hours rather than minutes, and sometimes reached double figures.¹⁸

Finally, it bears noting that future rail mergers are quite unlikely to produce the level of benefits to freight service that UP's comments regarding passenger service appear to assume. As UP pointed out in its opening comments on the ANOPR, it is "question[able] whether additional Class 1 consolidations will ever be in the public interest" because they are likely to produce few of the public benefits of past mergers.¹⁹ Given this, a merger that caused any significant harm to Amtrak service almost certainly would not be in the public interest, and should be approved only if it is conditioned in a way that ameliorates the harm to Amtrak and its guests.

B. There Is Nothing Unreasonable About
Imposing Conditions on Mergers to Mitigate
Harms Caused By Increased Freight Traffic

UP argues that if a merger triples the volume of intermodal traffic that UP handles over a route, UP should be "free to add those [additional] trains to its mainlines without governmental approval or interference."²⁰ To the extent that the "governmental interference" to which UP refers is the Board's power to condition and oversee mergers, there are two reasons why this is not and should not be the case.

¹⁸ See STB Ex Parte No. 573, Rail Service in the Western United States, Statement of Deborah S. Wetter of Amtrak, filed Oct. 23, 1997, at 5 (noting that Amtrak's Los Angeles-to-New Orleans Sunset Limited" had experienced 12 to 15 hour delays on "numerous occasions" due to the UP/SP merger service crisis, and that the most recent eastbound train had arrived in New Orleans 11 hours and 25 minutes late).

¹⁹ UP Comments on ANOPR at 2.

²⁰ UP Reply Comments at 28.

First, Congress has authorized the Board to approve rail mergers only if they are “consistent with the public interest”. 49 U.S.C. 11324(c). For that reason, the Board has a duty to scrutinize all impacts of mergers – including, for example, their effects on the environment, safety, and rail operations – even though the same types of impacts would not be subject to regulatory review if they occurred as a result of other causes.

Second, major rail mergers result in extraordinary and far reaching changes in freight operations that occur during a very short period of time. Although the effects of the Conrail Acquisition were largely confined to one part of the country (which will not be the case with future mergers), only a handful of other events (such as World War II) have precipitated so many changes in rail freight operations, many of which occurred, quite literally, overnight. By contrast, UP’s hypothetical tripling of intermodal traffic would affect only a single route, and would undoubtedly occur over an extended period of time.

Increases in freight traffic produce financial benefits to the affected railroads, and may in some cases provide public benefits as well. However, when freight train operations increase as a result of a merger, the Board is required to consider the impact on the public interest. If the additional freight operations will cause deterioration in the on-time performance of Amtrak trains that operate over the same routes, the Board should impose conditions to remedy that harm, just as it would for other types of merger-related harms. If additional track or yard capacity is required to mitigate this harm, its cost should be borne by the railroads whose merger makes it necessary, and not by Amtrak.

**B. Additional Capacity Needed to Accommodate
Increased Operations Must Be Determined Case-by-Case**

Amtrak shares UP's concerns about rail system capacity.²¹ However, UP's assertion that "[e]very additional passenger train occupies scarce freight capacity"²² is not correct. As UP has pointed elsewhere, there are "line segments and terminals that do not present capacity concerns."²³

Whether additional capacity is required to accommodate increases in passenger operations, or in freight train operations that result from a merger, must be determined through careful case-by-case analysis. This is why Amtrak has urged the Board to provide more specifics in its proposed regulations governing line capacity issues, and to require applicants to provide additional information regarding the equally critical issue of freight yard and terminal capacity.

**C. Deferred Maintenance Must Be Addressed
Before Mergers Are Implemented**

In its opening comments, Amtrak urged the Board to require applicants to include in their SAPs descriptions of (i) the steps they would take before merger implementation to address deferred maintenance on key lines, and (ii) how they would schedule or augment maintenance-of-way activities to avoid having to perform major maintenance on key lines during the crush of merger implementation. Amtrak also provided specific examples of congestion problems

²¹ See, e.g., Amtrak Comments on ANOPR at 3.

²² UP Reply Comments at 26.

²³ UP Reply Comments on ANOPR at 21. UP made this statement in opposing Amtrak's suggestion that the Board require merger applicants to conduct capacity studies on lines where freight traffic would increase by four or more trains a day as a result of their merger.

that were created or exacerbated by the need to remedy deferred maintenance on key lines at the same time that recent mergers were being implemented.

In response to Amtrak's proposal, CSX stated that "plans for major track maintenance are appropriately addressed in a service assurance plan." CSX added, however, that it "would object to the addition of a strict requirement that all planned major maintenance be completed prior to merger implementation."²⁴ In a similar vein, BNSF, which also did not voice any objections to Amtrak's proposal, deemed it "essential that any service assurance program not interfere with upgrades to the rail infrastructure."²⁵

Amtrak agrees with CSX's and BNSF's comments. No planning process is perfect, and many events cannot be predicted in advance. Therefore, merging railroads must be permitted to update and modify their plans for the scheduling of maintenance and capacity enhancement projects, even if this results in some short term service disruptions. Amtrak's proposal regarding track maintenance planning specifically contemplated such modifications, and that the Board and other parties would be advised of them.²⁶ This approach is consistent with Amtrak's position that, while applicants should be held to the commitments they make during merger proceedings, SAPs should be viewed as flexible documents.²⁷

²⁴ CSX Reply Comments at 75.

²⁵ BNSF Reply Comments at 31.

²⁶ Amtrak Comments at 8.

²⁷ See Amtrak Comments on ANOPR at 7 and Amtrak Reply Comments at 4.

However, most track maintenance needs are predictable, and the time periods during which major maintenance and upgrading projects can be performed are generally not inflexible. Requiring applicants to develop plans to address major maintenance needs before merger implementation will help ensure that, to the maximum extent possible, future mergers are not implemented in the midst of slow orders and major maintenance activities that worsen congestion problems.

E. Competition Enhancing Conditions
Would Not Remedy Harms to Amtrak's Service

As CSX's reply filing details,²⁸ the Board's proposal to "remedy" merger-related service problems by requiring applicants to make proffers to "enhance competition" has been criticized by many parties to this proceeding who have otherwise found little common ground. Needless to say, this proposal would also do nothing to remedy merger-related harms to Amtrak or its guests. The Board can remedy those harms only by imposing conditions that will prevent a repetition of the major delays to Amtrak trains that have accompanied recent mergers, and by vigorous oversight of merger implementation.

F. The Board Should Not Interfere With
Contracts Between Amtrak and Freight Railroads

NS states that "[t]he Board should not use its merger review authority as a vehicle for . . . rewriting the contractual agreements made by either party" to a contract between a freight railroad and a passenger rail operator.²⁹ Amtrak has

²⁸ CSX Reply Comments at 11-24.

²⁹ NS Reply Comments at 51.

never asked the Board to modify the terms of a contract between Amtrak and a freight railroad in a merger proceeding. However, freight railroads have asked the Board to modify the terms of their contracts with Amtrak.³⁰ Amtrak agrees that the Board should not entertain such requests by either party.

G. The UP-SP Merger Is Not the Reason That Various
Passenger Services Proposed By URPA Do Not Exist

UP has taken issue with assertions by a group identified as the United Rail Passenger Alliance ("UPRA") that the UP-SP merger has precluded the initiation or reinstitution of intercity passenger services on three UP lines.³¹ UP is correct that, even if the UP-SP merger had not occurred, Amtrak would not be operating passenger trains over the lines identified by URPA, two of which are not in service.

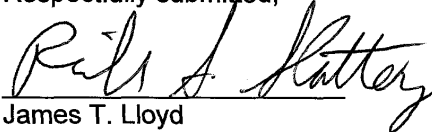
³⁰ STB Finance Docket No. 33388, CSX Corp. and CSX Transportation, Inc., Norfolk Southern Corp. and Norfolk Southern Ry. – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corp. Decision No. 89, served July 23, 1998, at 95 (noting that NS and CSX had asked the Board to override terms of an agreement between Amtrak and Conrail, but that a ruling on this "difficult issue" was unnecessary because the parties had reached a negotiated resolution).

³¹ UP Reply Comments at 32, n. 33.

CONCLUSION

For the reasons stated above and in Amtrak's opening and reply comments, the Board should adopt final merger regulations that reflect the modifications to the Board's proposed regulations that Amtrak has suggested.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Rich G. Slattery", written over a horizontal line.


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Dated: January 11, 2001

CERTIFICATE OF SERVICE

I certify that I have, this 11th day of January 2001, served copies of the foregoing Amtrak's Rebuttal Comments in Response to Notice of Proposed Rulemaking by first class mail, postage prepaid, upon all parties of record in this proceeding.


Richard G. Slattery